86 - 1319

Supreme Court, U.S.
FILED
FEB 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

VICTOR H. VAN SANT,

Petitioner

v.

UNITED STATES POSTAL SERVICE,
U.S. ARMY CORPS OF ENGINEERS, AND
MERIT SYSTEMS PROTECTION BOARD,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD EARL WRIGHT
1819 H Street, N.W.
(Suite 560)
Washington, D.C. 20006
(202) 457-9044

Attorney for Petitioner

QUESTIONS PRESENTED

1. Can a Court of Appeals, when acting as a court-of-first-instance under the Equal Access to Justice Act, award attorney fees to a prevailing party in a manner markedly more arbitrary than the procedure required of district courts in Hensley v. Eckerhart, 461 U.S. 424, and City of Riverside v. Rivera, 477 U.S. ___, avoiding factual findings and careful explanations, and foreclosing review?

2. Does an award of attorney fees of less than $3.50 per hour to a party who prevailed on the central issue in 14 years of litigation violate Congressional intent in the Equal Access to Justice Act to assure effective access to the judicial process for correction of government wrongs?

3. Can a Court of Appeals take note

of agency misconduct in causing and prolonging 14 years of litigation yet fail to consider Congressional intent in the Equal Access to Justice Act to award fees in such circumstances based on agency "bad faith"?

Table of Contents

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iii
Opinions Below	1
Basis for Jurisdiction	2
Statute Involved	2
Statement of the Case	4
Reasons for Granting the Writ	22
Question #1	22
Question #2	24
Question #3	31
Conclusion	38
Appendix	
Opinions, Orders sought to be reviewed, including rehearing	A1 thru A10
Other opinions, orders in the case	A11 thru A62
Statutes	B1 thru B6
Regulations	B6 thru B7
Other material	C1 thru C2

Table of Authorities

Cases	Page
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)	25

	Page
Camero v. U.S., Ct.Cl. 1967, 375 F.2d 777	15
Ciambelli v. U.S., Ct.Cl. 1974, 203 Ct.Cl. 680	15
City of Riverside v. Rivera, 477 U.S. ___, 91 LEd 2d 466 (1986)	4, passim
Devine v. Sutermeister, Fed. Cir. 1984, 733 F.2d 899	22
Dogherra v. Safeway Stores, CA9 1982, 679 F.2d 1293	34
Fitzgerald v. Hampton, D.D.C. 1982, 545 F.Supp. 53	33, 34
Gratehouse v. U.S., Ct.Cl. 1975, 512 F.2d 1104	15
Hall v. Cole, 412 U.S. 1 (1973)	33
Hensley v. Eckerhart, 461 U.S. 424 (1983)	4, passim
Horne v. MSPB, CADC 1982, 684 F.2d 155	15
Johnson v. Georgia Highway Express, CA5 1974, 488 F.2d 714	6
McQuiston v. Marsh, CA9 1983, 707 F.2d 1082	34
Natural Resources Defense Council v. U.S. Environ. Prot. Agency, CA3 1982, 703 F.2d 706	22
Rasmussen v. U.S., Ct.Cl. 1976, 543 F.2d 134	15
Ryder v. U.S., Ct.Cl. 1978, 585 F.2d 482	15
SEC v. Chenery Corp., 332 U.S. 194 (1947)	15
Skehan v. Bd. of Trustees, CA3 en banc 1973, 538 F.2d 53	34
Texas Instruments v. Radcliff Materials, 451 U.S. 630 (1981)	25
Tyler Business Services v. NLRB, CA4 1982, 695 F.2d 73	10, 22, 24
Vaughn v. Atkinson, 369 U.S. 527 (1962)	33
Vitarelli v. Seaton, 359 U.S. 535 (1959)	15

Page

Statutes

28 U.S.C. 2412 - Costs and Fees [Equal Access to Justice Act, 94 Stat. 2330, 99 Stat. 183] 2, passim

5 U.S.C. 3503 - Transfer of Function [Veterans Preference Act, 58 Stat. 390] 8

5 U.S.C. 1101 Note - Appellate procedure savings clause Civil Service Reform Act, 92 Stat. 1223] 17

5 U.S.C. 5596 - Back Pay [Back Pay Act, 92 Stat. 1216] 16

Regulations

5 C.F.R. Part 351 - Reduction in Force 14, 36

Other Authorities

1980 House Report No. 96-1418 (EAJA), 1980 U,.S. Code Cong. and Admin. News, p. 4988ff 26ff

1985 House Report No. 99-120 (EAJA), 1985 U.S. Code Cong. and Admin. News, p. 132ff 25ff

Federal Rules of Civil Procedure, Rule 60(b)(4) 16

Moore's Federal Practice, 2nd ed., Matthew Bender Publisher 16

Note, "Reenacting the Equal Access to Justice Act: A Proposal for Automatic Fee Awards," 94 Yale L.J. 1207 (1985) 26

Note, "Equal Access to Justice Act in the Federal Courts," 84 Colum.L.Rev. 1088 (1984). 27

OPINIONS BELOW

The Fourth Circuit's order, unpublished, of July 29, 1986, making an award of fees and expenses is reproduced in the Appendix at pages A1-A2. An opinion issued on denial of rehearing, published, not yet appearing in Fed.2d reports, filed November 13, 1986, is reproduced in the Appendix at pages A3-A10. Reproduced at pages A11-A15 is the Fourth Circuit's unpublished opinion in this case of August 29, 1985, purporting to dispose of the substantive issues in controversy. This opinion affirms, and relies in part on, an unpublished opinion of the District Court (E.D. Va., Alex. Div.), issued October 24, 1984, reproduced at pages A16-A36. Two earlier unpublished decisions of the Fourth Circuit in this case are reproduced at pages A37-A53 (March 24, 1983), and pages A54-A62 (Sept. 7, 1979).

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1986. Petitioner filed a timely petition for rehearing that was denied on November 13, 1986, with an accompanying opinion. This Court has certiorari jurisdiction under 28 U.S.C. section 1254(1), section 2101(c), Court Rule 20.

STATUTE INVOLVED

After an experimental period, Congress renewed and made permanent the Equal Access to Justice Act, 94 Stat. 2330, on August 5, 1985, with amendments, 99 Stat. 183, 5 U.S.C. 504, 28 U.S.C. 2412. The text of relevant provisions is found in the Appendix at pages B1-B5. The two portions of the Act that are chiefly applicable provide:

28 U.S.C. section 2412(b): "Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in

any civil action brought by or against the United States or any agency. . . . The United States shall be liable for fees and expenses to the same extent that any other party would be liable under the common law ... "

28 U.S.C. section 2412(d)(1)(A):

"Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

STATEMENT OF THE CASE

This case presents the question whether a Court of Appeals has authority when acting as the court of first instance to award attorney fees and other expenses under the Equal Access to Justice Act to a partially prevailing party in a manner strikingly more arbitrary than the procedure this Court has required of U.S. District Courts under similar acts adopted "to ensure 'effective access to the judicial process,'" Hensley v. Eckerhart, 461 U.S. 424, 429; City of Riverside v. Rivera, 477 U.S. ___, 91 L.Ed 2d 466. Also presented is whether a Court of Appeals so acting can arbitrarily award attorney fees of less than $3.50 per hour to a party who has prevailed on the central issue throughout 14 years of proceedings, without the court even considering the central issue, and whether or not it can properly refuse to make relevant findings under the Act, suggested by its own opinion,

that the U.S. agency caused and prolonged the litigation in bad faith.

Required District Court procedure. The procedure required of District Courts in Hensley, supra, and Riverside, supra, is to follow a reasoned process of careful factual and legal determination accompanied by adequate explanation. After determining plaintiff has prevailed on "any significant issue" in litigation which achieves a benefit sought, "the most useful starting point," Hensley states at 433, is to determine "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," id. "This figure, commonly referred to as the 'lodestar,' is presumed to be the reasonable fee contemplated by section 1988," the Court said in Riverside, 91 L.Ed.2d at 476, subject to certain adjustments. Lodestar determination should be "objective," based on "evidence supporting the hours ... and

rates claimed," the district court using private "billing judgment" to reduce any excessive charges, Hensley at 434.

Second, to refine the lodestar calculation and adjust it suitably, the district court should then consider "12 factors" identified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (CA5, 1974); Hensley at 430, 434; Riverside at 475, 477. And, finally, the court should weigh the "results obtained," considering any non-compensable work on "unsuccessful claims," and overall "success" in regard to relief, Hensley at 434, Riverside at 476. Fee award discretion "must be exercised in light of the considerations we have identified," the Court said in Hensley at 437 (called "guidelines" in Riverside at 476). And "It remains important, . . . for the district court to provide a concise, but clear, explanation of its reasons for the fee award," Hensley stated at 437. Such an

explanation is necessary to due process and to a proper review of whether the court's discretion has been soundly exercised. (Remands for reconsideration directed in Hensley and Riverside.)

Nature of application below. In this case, petitioner timely applied in June 1986, to the Fourth Circuit Court of Appeals for EAJA attorney fees and expenses under 28 U.S.C. 2412(b) (agency "bad faith"), and, alternatively, section (d)(1)(A) (agency position not substantially justified), following a partially favorable decision by the Fourth Circuit on the merits in August 1985 (A11), and the final denial by this court of a petition for writ of certiorari (No. 85- 1096) seeking review of relief aspects. Petitioner applied to the Court of Appeals directly since he prevailed there on defendants' cross appeal, and prevailed there in prior appeals in 1979 (A37) and 1983 (A54).

Substantive merits below. The August 1985 decision of the Fourth Circuit had upheld a District Court determination (E.D. Va., Alex. Div.) that Van Sant was unlawfully released from the U.S. Postal Service in October 1971 by an August 1971 release Notice issued in violation of veteran's transfer rights under 5 U.S.C. 3503 (Appen. B5) when employees from the Army Corps of Engineers took over his job function (A14). But the Fourth Circuit's unpublished summary disposition also affirmed, without explanation, a District Court determination that "it is only from ... December 7, 1971, that the plaintiff's termination can be valid. He is therefore entitled to the pay he would have received from October 12, 1971, the day he was released until the time he would have been released had a notice of termination been given him on December 7, 1971," (A26), emp.sup. The District Court thus did not

reinstate Van San to federal service, but directed pay and other benefits limited to what he "would have received had a notice of termination been given him" by the Postal Service 102 days after the actual notice.1/

Award Procedure below. On July 29, 1986, the Fourth Circuit responded to the fee application with an arbitrary one-sentence award. The award text read in its entirety:

> "IT IS ORDERED that the application for attorney's fees and other expenses is granted and appellant Van Sant is awarded a total of $5,000," (A2).

1/ For reasons discussed infra p. 14-15, petitioner believes the District Court's relief order is unenforceable (since it contains no date of actual release, other than the original October 1971 date, which is nonsensical) and is void for reasons of public policy (since the order directly violates Civil Service notice regulations, the Back Pay Act, and decisions of this court limiting the power of federal courts in federal personnel matters). In the fee application, petitioner noted the need for further proceedings to interpret, or void, the District Court's order.

The one-sentence award failed to specify under which section of the Act it was made, did not indicate what expenses or hours were compensated, contained no lodestar or other calculation of hours and fees, and gave no reasons to explain or support an award of less than $3.50 per hour to prevailing counsel.

Petitioner requested rehearing, urging, inter alia, that the court adopt a Rule of Court en banc establishing a uniform, fair, due process procedure for handling attorney fee applications when acting as court-of-first-instance. Petitioner suggested use of the pattern followed in Tyler Business Services v. NLRB, 695 F.2d 73, 77 (CA 4, 1982). In that EAJA proceeding the Fourth Circuit panel directed counsel to confer, a revised application to be prepared, then said: "The clerk is directed to review the application and ...comments...and submit his findings to the

court with copies to counsel. The parties may file objections, and the court will review the clerk's findings de novo."

On November 13, 1986, the court "denied rehearing" (A4). It did not issue a Rule, but a member of the panel issued an explanation of its "reasons for the award," (A5) (concurrence by other members, in contrast with earlier practice, see e.g., A2, is not clearly indicated). Since the court "denied" rehearing, the effect of this procedure was to accord petitioner no right whatever to question the court's factual or legal basis in the explanation. (The equivalent conduct in an ordinary case would be for all findings of fact, conclusions of law, and reasons for decision to be postponed to the final action by a Court of Appeals and issued upon "denying" a petition for review.)

Contents of explanation. The November 13 explanation adhered to the $5,000 award

figure. Inferentially, it indicated the award was based on section (d)(1)(A), but this was not specified, nor did the explanation discuss section (b) (bad faith), stressed by the application. This omission occurred although the explanation noted that the Postal Service was "dilatory and delinquent in developing the facts" (A7), twice "asserting without justification ... that the facts had been developed, and ... did not support the ... relief ... achieved" (id.).

The November 13 explanation handled section (d)(1)(A) issues cursorily without following Hensley and Riverside procedure. It did not compute compensable hours times an appropriate hourly compensation rate (the "lodestar" figure), compensable expenses, or make any calculation of hours devoted to the central issue or to unsuccessful claims. Using a broad brush with few specifics, the explanation asserted counsel's submissions

were "prolix," "frivolous," and lacking "credence," and that a 1980 appeal by counsel "unduly prolonged" the case (A7, A8, A9). It reasoned petitioner had made "extravagant claims" but achieved "only very limited success" (A5). Categorizing the monetary value of plaintiff's recovery as "$5,600" compared to "$400-500,000" sought (A6), it broadly reasoned that a $5,000 award was somehow suitable considering "the gross disproportionality between Van Sant's recovery and the fee requested," the four assertions mentioned above, and the "effort that should have reasonably been expended" (A9-A10).

Explanation errors not subject to challenge below. Denial of rehearing prevented petitioner from seeking to correct mistaken facts and reasoning in the November 13 explanation, including making the following observations:

1. Monetary figures in error. The

"$400-$500,000" figure placed on Van Sant's back-pay "claim" is without basis because Back Pay Act (5 U.S.C. 5596) and USPS regulations require treating outside earnings and periods of incapacity to work as off-sets. While no back pay determination has been made, the explanation uses a highly unrealistic claim figure. The "$5,600" figure placed on Van Sant's "recovery" is also without basis. The explanation erroneously treats the court's August 1985 decision as having determined Van Sant was "entitled to compensation [from] October 12, 1971 . . . to December 7, 1971" (A5-A6). But the district court merely directed such benefits as Van Sant would have received "had a notice of termination been given him on December 7, 1971," emp. sup. (A27, A36), without specifying a release date different from the October 1971 date actually given Van Sant. Civil Service Regulations require a notice

of release to be issued "at least 30 full days, but not more than 90 full days, before the effective date of the release," emp. sup., 5 C.F.R. 351.801, see Appen. B6. Since a release date of October 1971 would be non-sensical for a later-issued notice, the relief ordered is unenforceable on its face.2/ Thus, the chief basis for the

2/ Moreover, the order appears void for convincing reasons. This court has declared that "a simple but fundamental rule of administrative law" is that a federal court is authorized only to pass on the validity of agency action actually taken, and is "powerless to ... substitut[e] what it considers to be a more adequate or proper basis" since "to do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency," emp.sup., SEC v. Chenery Corp., 332 U.S. 194, 196; held applicable to federal personnel actions in Horne v. MSPB, 684 F.2d 155 (CADC 1982). For related reasons, this court has also held that the wrongful release of a federal employee in violation of law or binding regulations is a legal nullity, the merits of what the agency might have done are irrelevant, and only after restoration to duty and payment of interim back pay can the agency undertake a new personnel action, Vitarelli v. Seaton, 359 U.S. 535 (1959); accord: Camero v. U.S., 375 F.2d 777 (Ct.Cl. 1967); Ciambelli v. U.S., 203 Ct.Cl. 680 (1974); Gratehouse v. U.S., 512 F.2d 1104, 1110 (Ct.Cl. 1975); Rasmussen
(con't, next page)

$5,000 fee award, that only limited success has been achieved, is at best premature and probably wrong.

2. All other factual specifics also in error. The other few factual specifics in the explanation likewise are baseless. (a) The explanation accuses counsel of "prolix" and "frivolous" paperwork, but illustrates this only by stating that the fee application contained "39 pages of text" with exhibits (A7, ft. 2). This reveals a misconception of Hensley, Riverside, and EAJA itemization requirements for an application covering 14 years of legal proceedings (1971-1985). (The table of contents of the application is reproduced in the Appendix at

2/ (con't.) v. U.S., 543 F.2d 134, 141 (Ct.Cl. 1976); Ryder v. U.S., 585 F.2d 482, 487 (Ct.Cl. 1978). Vitarelli was embodied into statutory law in the Back Pay Act of 1966, 5 U.S.C. 5596, a controlling Act ignored by the District Court and the Court of Appeals. It is well-established that a void judgment or order can be set aside (see FRCP 60(b)(4); Moore's Federal Practice, Vol. 7, section 60.25[4]; Vol. 1B, section 0.407, p. 282-283).

C1-C2. Each heading deals with a legal or factual issue present, which the panel has not faced.) (b) Nor is there any truth to the assertion that a "frivolous" direct appeal occurred in 1980. The 1980 appeal was initiated by Van Sant when still acting pro se. It occurred because the Civil Service Reform Act of 1978 instituted direct Court of Appeals review of administrative board decisions generally. The district court's continued jurisdiction was ultimately held to rest on an obscure savings clause buried in a long "Note" appended to 5 U.S.C. 1101. Similar direct review attempts occurred in virtually every Circuit before its existence and meaning became known. Additionally, Van Sant sought direct review under 28 U.S.C. 1651, the All-Writs Statute, seeking enforcement of the court's 1979 mandate to MSPB to hold a "complete evidentiary hearing." Although the Court of Appeals denied review on this

ground (with no explanation), a review would have expedited the proceedings since that court's eventual 1983 decision in fact remanded to cure noncompliance with the 1979 mandate (A39, A48). (c) Likewise, the sole illustration given to support an assertion that fee application time figures lack "credence" -- that "419.6" hours could not have been devoted to 1984 district court proceedings (A8-A9) -- is unsupported by any analysis of the situation confronting counsel at that time. As of 1984, Van Sant had received four adverse decisions on the merits from "expert" government agencies (two Civil Service Commission decisions in 1972, 1973; two MSPB decisions in 1980, 1984). He had also suffered two adverse district court decisions, in 1977 and 1981. He had obtained two reversals from the Court of Appeals on lack-of-substantial-evidence reasoning, but the Court had failed to grant substantive relief. The MSPB's latest

adverse decision was a jumble of disorganized, incomplete findings full of fallacious notions of federal personnel law, particularly on the key issue, inter-agency details of personnel. Since the MSPB had ruled it could not summon 1971 witnesses who were not still government employees, the serious problems confronting counsel included whether to risk not invoking district court evidentiary processes. In the end counsel prepared a 45-page summary judgment motion that comprehensively explained MSPB legal error under applicable authority, and conclusively showed why Van Sant's release was necessarily unlawful on MSPB-found facts. This major analytic effort greatly reduced counsel's time needed before the Court of Appeals to defend against a USPS cross-appeal. The criticism of counsel's hours shows no understanding of the depressingly uphill nature of employee suits against federal agencies.

3. The central issue ignored. The view in the explanation that counsel obtained only an easily-secured holding that Van Sant's 1971 release was unlawful disregards that the legality of Van Sant's release was the central, almost exclusive, issue throughout 14 years of litigation. Only when the district court in 1984 directed its peculiar relief sua sponte, did relief become an issue; and even then only a small fraction of brief and oral argument time was devoted to this subject before the Court of Appeals. (Counsel estimates less than 5 percent of oral argument time.) The explanation also disregards counsel's success in obtaining an adequate factual record at the 1983 MSPB hearing. For 12 years the Postal Service had withheld and distorted the facts. Counsel obtained a satisfactory record of events that transpired 12 years earlier through Van Sant's testimony

supported by over 70 relevant documents, virtually none of which was supplied by the Postal Service. Considering the prolonged hostility of the Postal Service to factual discovery in this case, this was a major accomplishment.

4. Counsel's criticism of the August 1985 decision. The lack of a valid basis to explain dissatisfaction with counsel in the pre-August 29, 1985, record suggests that the strong words in the explanation may be related to post-August 29, 1985, events which are not a subject of the application, and are not relevant. In post-judgment papers counsel has sought publication of the August 29 decision as an unexplained, arbitrary departure from established law, and has explained the need for further proceedings. If this has irritated the panel, counsel regrets this but he has acted out of fidelity to Van Sant's interests.

REASONS FOR GRANTING THE WRIT

Question #1. The role to be played by Courts of Appeal as courts-of-first-instance for attorney fee awards under the Equal Access to Justice Act is necessarily large and growing. Since Congress in 1978 eliminated district court review over decisions by administrative boards and agencies, Courts of Appeal have become unavoidable EAJA courts-of-first-instance in hundreds of proceedings annually. See, e.g., Tyler Business Services v. NLRB (CA 4, 1982), supra; National Resources Defense Council v. U.S. Envir. Prot. Agency, (CA3, 1983), 703 F.2d 706; Devine v. Sutermeister (Fed. Cir. 1984), 733 F.2d 799. It is clearly of national importance that the procedure to be followed by such courts in discharging this responsibility should not be in doubt, should be consistent with Congressional intent, and observe due process requirements.

This Court has set forth an award determination procedure to achieve these objectives for comparable statutes which it has called "generally applicable to all cases in which Congress has authorized an award of fees to a prevailing party," Hensley v. Eckerhart, 461 U.S. at 433, ft. 7, and the Court has specifically indicated that this procedure governs district courts. But, in sharp contrast, the Court of Appeals panel below first made a flagrantly arbitrary award, then issued a published "explanation" revealing wide divergence from Hensley procedures (including no lodestar determination, no consideration of the central claim and issues; a broad-brush, unencumbered-with-details approach highly inaccurate in its few specifics and reasons, and issued in a manner cutting off all review except by this Court). This award-making approach does violence to due process, to guideline

instructions designed to assure compliance with congressional intent, and to this Court's review docket. For this Court not to accept certiorari and to fail to enforce a common procedure for all federal courts in determining EAJA fee awards when acting as court-of-first-instance will lead to widespread confusion at the Court of Appeals level (compare the careful procedure used in Tyler Business Services, CA4 1982, discussed supra at p.10, with the panel below), will stimulate and approve other arbitrarily-arrived-at award decisions, and will inflict drastically unequal treatment on EAJA fee applicants for no just reason.

Question #2. Though purporting not to be "punitive" (A9), the decision below compensates 1431.5 hours of carefully documented counsel time at less than $3.50 per hour, and provides no separate compensation

for Van Sant's own 9 years of pro se expenses. The explanation below reasons that an insignificant award is suitable to "what little merit there was in Van Sant's case" (A8), based largely on a results-obtained calculation that is without any factual or logical basis (supra, p.14-15).

In applying a specific attorney's fee provision, a court must of course be guided by congressional intent, Texas Instruments v. Radcliff Materials, 451 U.S. 630, 639; Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 262. The decision below has disregarded that the Equal Access to Justice Act embodies a major new national policy to "ensure that certain individuals [and small businesses] will not be deterred from seeking review of ... unjustified governmental action because of the expense involved in securing the vindication of their rights," 1985 House Report No. 99-120, Judiciary Committee, at 1985 U.S. Cong. &

Admin. News, p. 132-133. And see 1980 House Report No. 96-1418, Judiciary Committee, at 1980 U.S. Cong. & Admin. News, p. 4984, 4988. The decision below disregards that the Act was enacted to achieve "a new and pressing end - that of ensuring administrative accountability;" it established a "general presumption in favor of an award in ... a dramatic departure from both the common law and previous congressional practice," with fee awards "intended to act both as an incentive to ... challenges [of administrative action] and a disincentive to unreasonable governmental actions in the first place," Note, 94 Yale L.Rev. 1207-08 (1985). No glimmer of congressional intent is discernible in the decision below.

It is significant that numerous decisions handed down by federal courts during the Act's initial three-year experimental period (1981-1984) were the subject of sharp criticism in Congress. In

renewing, amending, and making the Act permanent in 1985, the House Judiciary Committee noted that federal courts "are misconstruing the Act ... in a narrow fashion which has helped the Federal Government escape liability for awards," 1985 House Report, loc.cit, p. 137. And see 84 Columbia L.Rev. 1089 (1984), "The Equal Access to Justice Act in the Courts," noting "narrow" court interpretations that have "unnecessarily limited the Act's scope," p. 1089-90. During its experimental three-year initial period, the Committee noted, awards under the Act totaled but $3.9 million, "dramatically less than the $100 million annual cost estimated by the Congressional Office (CBO)" (id.)!

In an effort to correct Court misinterpretations defeating its intent, Congress in 1985 reiterated the original purpose of the Act and adopted clarifying amendments under bipartisan sponsorship

(ibid, p. 137-141, 145-146; no Senate Judiciary Committee report was deemed necessary). One such change under section (d)(1)(A) was to define "position of the United States" so as clearly to embrace "actions and omissions of an agency which formed the basis of the adversary adjudication ... the Congressional intent [being] to provide attorney fees when an unjustifiable agency action forces litigation ..." (ibid,p. 140).

The published explanation below, however, takes no note of the Act's original purpose, the purpose of 1985 amendments, or of the agency's initial position in failing and refusing to explain irregular Corps of Engineer details that unjustifiably forced Van Sant to litigate. It takes no note in calculating fees of the effect agency recalcitrance toward developing an adequate factual record, and agency use of fallacious legal arguments, necessarily had in multiplying

counsel's time (supra p. 18-20). It ignores petitioner's success on the central, almost exclusive issue for 14 years (supra p. 20), and minimizes the rights vindicated.

The decision below is a continuation of the harsh, unsympathetic judicial approach to the Act that defeated accomplishment of its original purpose and now threatens to defeat its extension unless this Court intervenes.

The Fourth Circuit has seldom been called upon to address federal personnel law issues, which normally are passed on by the Federal Circuit, and before 1978 went to the U.S. Court of Claims. In failing to inform itself in this area, the panel below has now reached an arbitrary culmination of its prior disregard of established federal personnel law (supra p. 14-15), and has chosen to treat Van Sant's rights to continued employment as virtually meaningless. This is unsupportable intrinsically. It is

also in conflict with national policy, for when Congress changed the previous fee award rules, it deliberately intended by EAJA Section 2412(d)(1)(A) that citizens "securing vindication of their rights [would no longer be unable] to recover attorney fees [that] preclude[d] resort to the adjudiciatory process" regardless of the "cost of contesting a Government order," 1980 House Report, loc.cit., p. 4988. The Congressional intent in enacting the Act deliberately avoided a rule of proportionality between fee awards in EAJA cases and the monetary value that could be placed on the rights vindicated. Under the Act's legislative history this is as clear, indeed clearer, than the congressional intent was recently found to be in regard to Section 1988 fee awards in City of Riverside v. Rivera, supra, 91 LEd.2d at p. 480-481, 482, 486.

Not only does a $3.50 per hour

attorney fee award not accomplish congressional purpose, it constitutes a severe deterrent to further representation of wrongfully released federal employees. The decision below is a spit in the eye to the veteran's employment right established as violated, the very opposite effect Congress intended.

Congress has twice tried to make its desire for genuine change in this area clear. The decision below has made the intervention of this Court necessary to assure that congressional intent behind the Equal Access to Justice Act will be faithfully implemented by federal courts.

Question #3. The emphasis in petitioner's fee application was on section 2412(b) (bad faith), which the decision below entirely fails to discuss. In recommending section (b) the House Committee explained that under its provisions the

United States in the discretion of the awarding court "would be liable for fees under the 'bad faith' ... exception to the American rule," stating "there appears to be no justification for exempting the United States," 1980 House Report, loc.cit., p. 4987. The United States, moreover, "would be liable under the same standards [as] other parties," the Report said, ibid, p. 4996. Unlike (d)(1)(A) awards, however, Congress provided that section (b) awards would have to be paid exclusively out of the offending agency's own funds "to make the individual agencies and departments accountable," id. And it freed section (b) awards of various (d)(1)(A) limitations such as the $75/hour cap for attorney fees.

Section (b) has been interpreted to permit awards both for pre-litigation bad faith ("when a party confronted with a clear statutory or judicially-imposed duty towards another is so recalcitrant in performing

that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights," Fitzgerald v. Hampton, D.D.C. 1982, 545 F.Supp. 53, 57, relying on Vaughn v. Atkinson, 369 U.S. 527); and for "bad faith ... found ... in the conduct of the litigation," Hall v. Cole, 422 U.S. 1, 15.

There were sound reasons for enacting section (b). Government attorneys generally have less than full Civil Service protection. They are subject to direction by agency leadership, and may be judged for their loyalty when seeking promotion. They are not free to be insistent on pressing superiors for a full disclosure of relevant facts. Before the EAJA, agency personnel guilty of obvious wrongs could rely on the sheer oppressiveness of the contest to grind down most individual opponents and prevent exposure of agency misconduct. In section (b) Congress established a new public policy

that awards of fees and expenses henceforth could be made against any agency guilty of misconduct that caused or prolonged litigation under principles similar to those at common law for assessing punitive or exemplary damages, Fitzgerald v. Hampton, supra; McQuiston v. Marsh, CA 9 1983, 707 F.2d 1082, 1086; and see Skehan v. Bd. of Trustees, CA 3 en banc 1976, 538 F.2d, 53, 57-58; and Dogherra v. Safeway Stores, CA 9 1982, 679 F.2d 1293, 1297. Clearly, this important discretionary power should be soundly exercised to accomplish congressional intent.

Although the facts in this case strikingly indicate agency bad faith, both in forcing and in protracting the litigation, the decision below has failed to consider the new national policy in section (b) despite remarks in the November 13 explanation that reveal a likely basis for a section (b) finding. The explanation

acknowledges that the Postal Service was "dilatory and delinquent in developing the facts," that despite remand orders the Postal Service continued to resist factual development in the record, and that the Postal Service should have known from an early stage it lacked a valid defense against Van Sant's claim to unlawful release, supra p. 13.

Examined more carefully, the record shows a trail of agency misconduct, as follows: (1) bad faith in not investigating and determining the facts initially (since, at all times, the presence of Corps of Engineer personnel at Van Sant's work station performing his work was readily ascertainable, as was the irregular nature of these details); (2) bad faith in adopting a hostile position toward Van Sant's claim to improper release and forcing him to litigate when the agency failed to assemble a reliable factual basis for doing so (Civil

Service Commission Regulations obligated the Postal Service to inform released employees of all relevant facts necessary to appeal their release, 5 C.F.R. 351.802, Appen. B6); and (3) bad faith in resisting Van Sant's claim throughout 14 years of litigation by repeatedly failing to disclose the essential facts, repeated factual misrepresentations, and reliance on fallacious arguments (Postal Service nondisclosure characterized the entire proceedings; a key USPS misrepresentation at the outset, denying reassignment of Van Sant's work, deprived him of early USPS reemployment; a key misrepresentation that sabotaged the 1980 MSPB hearing was that Van Sant's work was "contracted out" to a private company; no Postal Service legal contention was ever sustained at the Court of Appeals level.3/

3/ The 1984 relief ordered by the District Court was adopted sua sponte.

Van Sant sought only to have his agency honor a basic, well-known right of veterans established by Congress, to be retained on the federal payroll so long as his performance and skill measure up to any applicable standard and his job function continues to be performed by a federal agency. The agency's protracted defense boils down to pure stonewalling. Yet the Court of Appeals decision below treats section (b) as non-existent.

This Court has not yet accepted a case involving the Equal Access to Justice Act, but its intervention is urgently needed to assure that federal courts will exercise their discretion soundly to carry out an important new national policy toward federal agency litigation bad faith. Congress has directed an end to U.S. government immunity in needlessly causing and prolonging litigation. Section (b) properly enforced has important potential to curb excesses in

government conduct that victimizes established legal rights. But the decision below reflects a continuing Court of Appeals hostility to the EAJA that will sap this major new policy of vitality unless corrected by this court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Edward Earl Wright
Attorney for Petitioner
1819 H Street, N.W.
Suite 560
Washington, D.C. 20006
(202) 457-9044

Certificate of Service

I hereby hereby certify that three copies of the foregoing petition were mailed, first class mail, postage prepaid, this ___ day of February, 1987 to: (a) the Solicitor General, Department of Justice, Washington, D.C. 20530; and (b) counsel of

record for defendants, Kevin B. Rachel, Esq., Office of Labor Law, U.S. Postal Service, 475 L'Enfant Plaza, Washington, D.C. 20260-1131.

_____

Edward Earl Wright
Attorney for Petitioner

APPENDIX

Filed July 29, 1986
U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-2387(L)

Victor Van Sant, Appellant,

versus

United States Postal Service; et al. Appellees.

No. 85-1007

Victor Van Sant, Appellee,

versus

United States Postal Service; et al. Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon consideration of appellant's application for attorney's fees and other

expenses, appellees' response in opposition to the application, and appellant's reply in support of the application;

IT IS ORDERED that the application for attorney's fees and other expenses is granted and appellant Victor Van Sant is awarded a total of $5,000.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Widener and Judge Wilkinson.

For the Court,

John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

No. 84-2387(L)

Victor Van Sant, Appellant.

versus

United States Postal Service; et al. Appellees.

No. 85-1007

Victor Van Sant, Appellee,

versus

United States Postal Service; et al. Appellants.

On Petition to Rehear a Fee Award.

Submitted: August 12, 1986

Decided: November 13, 1986

Before WINTER, Chief Judge, and WIDENER and WILKINSON, Circuit Judges.

WINTER, Chief Judge:

In the fourth appeal in this case, we affirmed the district court's judgment finally terminating this litigation. After he unsuccessfully sought a writ of certiorari to review our judgment, Victor Howard Van Sant petitioned for an award of attorneys fees and expenses under the Equal Access to Justice Act in the total amount of $194,162.47. We awarded $5,000.00 and Van Sant has moved for rehearing of this issue, suggesting rehearing in banc. He argues that the award is manifestly inadequate and that we erred in not explicating the reasons to justify the allowance we made.

We deny rehearing, and no judge eligible to do so has requested a poll on the suggestion for rehearing in banc. We think that the award we made was

proper,1/ and we decline to increase it. We state our reasons for the award herein.

This litigation has continued for fourteen years. It has been before us four times. While Van Sant made elaborate and extravagant claims of violation of his rights as a result of a reduction in force in the United States Postal Service during which his position as a planning architect was eliminated, in the last analysis he achieved only very limited success. He ultimately prevailed only on his claim that his notice of termination was premature and that he was entitled to compensation for the period October 12, 1971 (the effective date of his actual release) to December 7, 1971

1/ The government has steadfastly contended that petitioner was not a "prevailing party" in the litigation within the meaning of the Act and tht the govern ment's position was substantially justified.

(the earliest date on which we determined that his termination could be legally effective). He has sought recovery of $400,000-$500,000 and reinstatement. He was denied reinstatement, and his recovery was limited to approximately $5,600. Not only was his recovery small in the monetary sense, the litigation resulted in the establishment of no new significant principles of law that would be of aid to any other person except in the extraordinarily unlikely event that the facts surrounding Van Sant's claim would be duplicated.

At the same time, in a very limited sense, we think that Van Sant is a prevailing party within the meaning of the Act. As a result of the first appeal, it should have been apparent to the defendant that the only issue was a limited factual one which it was directed to

develop. It was dilatory and delinquent in developing the facts, asserting without justification in the third appeal that the facts had been developed, and in asserting without justification, after we again required it to develop the facts, that they did not support the limited relief that Van Sant ultimately achieved.

Coupled with the very limited success achieved by Van Sant, we cannot blind ourselves to the frivolity of many of the arguments advanced by his counsel and the prolixity with which they were developed. 2/ In our view, they were largely unnecessary and a substantial waste of counsel's time and our time in

2/ A good example is his application for attorneys fees. It is a bound volume with thirty-nine pages of text and about double that quantity of exhibits. The time expended in preparing and the cost of duplicating this production are out of all proportion to the legitimate need of the application.

determining what little merit there was in Van Sant's case. We think also that his attempted direct appeal to us (the second appeal) from the decision of the Civil Service Commission was completely frivolous. Van Sant had already been through the process of application to the district court and appeal to us from its adverse decision. Notwithstanding a self-explanatory change in the applicable rules, he should have known well that he could not bypass the district court when he sought review the second time.

We have adverted to the excessiveness of counsel's production of paperwork. We think also that the claims for time expended are so grossly inflated that we can give them little credence. For example, for the last proceeding in the district court, counsel wants reimbursement for 419.6 hours. That

proceeding consisted of preparation and filing of a complaint in a case with which counsel should have had intimate familiarity, a motion for summary judgment, with replies thereto, and a single oral argument. It is inconceivable that it required more than a fraction of the time claimed.

We are of course mindful that there need not be strict proportionality between the amount recovered and the fee awarded, City of Riverside v. Ricera, _____ U.S. _____ (June 27, 1986), yet the gross disproportionality between Van Sant's recovery and the fee requested is a factor we consider. We consider also counsel's frivolous arguments, excessive paperwork, inflated time claims, and his conduct which has unduly prolonged the litigation, but we disavow any attempt to be punitive. Finally we

consider in the light of Van Sant's limited success, our estimate of the time and effort that should have reasonably been expended to accomplish that result.

PETITION DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2387(L)

Victor Van Sant,

Appellant,

versus

United States Postal Service;
U.S. Army Corps of Engineers and
Merit System Protection Board,

Appellees.

No. 85-1007

Victor Van Sant,

Appellee,

versus

United States Postal Servics;
U.S. Army Corps of Engineers and
Merit System Protection Board,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 84-417)

Argued: July 18, 1985

Decided: August 29, 1985

Before WINTER, Chief Judge, and WIDENER and WILKINSON, Circuit Judges.

PER CURIAM:

This is the fourth appeal in Victor Howard Van Sant's suit against the United States Postal Service, et al., resulting from the termination of his position as a "planning architect" with the Service. Van Sant claims violation of his rights under the Veterans' Preference Act of 1944, 5 U.S.C. § 3503(a), and under 5 C.F.R. § 351.201 et seq. of the civil service regulations. In the first appeal, we held that the Civil Service Commission had failed to develop a sufficient evidentiary record to justify its conclusion that Van Sant had not been denied any of his rights. We therefore directed the district court to remand the case to the Commission for a complete evidentiary hearing. Van Sant v. United States, No. 78-1583 (4 Cir. Sept. 7, 1979) (unpublished).

The Civil Service Commission (now the Merit Systems Protection Board (MSPB)) con-

ducted a hearing and again sustained Van Sant's separation. Van Sant sought to appeal directly to us, but we dismissed the appeal for lack of jurisdiction. Van Sant v. United States, No. 80-1531 (4 Cir. April 28, 1981) (unpublished). Van Sant then properly appealed to the district court, which affirmed the MSPB decision sustaining Van Sant's removal.

In a third appeal to us, we again reversed the judgment and directed that the case be remanded to the MSPB for a further evidentiary hearing. Van Sant v. U.S. Postal Service, No. 82-1305 (4 Cir. Mar. 24, 1983) (unpublished). We stressed that our repeated remands to MSPB were for the agency to take a realistic rather than a technical view of Van Sant's employment treatment. Specifically, we directed MSPB to determine if in fact employees of the Corps of Engineers (COE), to which Van Sant's job functions were purportedly transferred, con-

tinued to perform those functions for the Postal Service after Van Sant was discharged, and if so for what period of time.

After the last remand, MSPB again upheld the validity of Van Sant's discharge. The district court affirmed in part and reversed in part--correctly, we think. The MSPB found that after Van Sant received his termination notice (August 27, 1971) "essentially there was no dispute" that COE employees were detailed to the Postal Service to perform his job function until December 7, 1971. Notwithstanding the MSPB's legal opinion that this did not constitute a transfer of function, the district court discerned the reality of what occurred: "the same FDS work--Van Sant's work--was still being done; it was simply being done by COE personnel." The district court therefore ruled that it was only from December 7, 1971, the date that COE employees last performed Van Sant's former

job function, "that plaintiff's termination can be valid." It rejected Van Sant's argument that his job continued after that date, concluding that his various duties were validly dispersed among other positions. It awarded Van Sant the pay he would have received from his date of release (October 12, 1971) to the time that he would have been released had he received a notice of termination of December 7, 1971.

We agree with the factual and legal conclusions of the district court. We see no merit in Van Sant's contention that he is entitled to reinstatement and back pay to the date of reinstatement. We affirm on the memorandum opinion of the district court. Van Sant v. United States Postal Service, Civil Action No. 84-417-A (E.D. Va. October 24, 1984) (unpublished). AFFIRMED.

*Van Sant appeals from the part of the judgment limiting his relief. He contends that he is entitled to reinstatmeent and back pay until the effective date of reinstatment. The Postal Service appeals from the part of the judgment awarding Van Sant back pay for a limited period.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VICTOR HOWARD VAN SANT, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-417-A
UNITED STATES POSTAL SERVICE, UNITED STATES CORPS OF ENGINEERS, and MERIT SYSTEMS PROTECTION BOARD, Defendants.	)	

MEMORANDUM OPINION

This action is an appeal from a January 10, 1984 decision of the Merit Systems Protection Board (MSPB). The issues raised on appeal relate to the propriety of the plaintiff's October 12, 1971 termination through a reduction in force (RIF) of his employment as a planning architect with the United States Postal Service (USPS).1/ These issues have been the subject of

1/ Notice of the termination was given on August 27, 1971, but the plaintiff's last day of work was originally October 5, 1971, and by extension October 12, 1971.

two prior appeals. The first resulted in an opinion of this court affirming the original MPSB decision to uphold plaintiff's termination, which MSPB issued on August 1, 1973. Van Sant v. United States, Civil Action No. 77-756 (E.D.Va., decided April 27, 1978) (Van Sant I). The United States Court of Appeals for the Fourth Circuit reversed that decision remanding the case to the MSPB for a further evidentiary hearing. Van Sant v. United States, Appeal No. 78-1583 (4th Cir., decided Setember 7, 1979) (Van Sant II). The evidentiary hearing on remand again resulted in a decision adverse to the plaintiff. Van Sant v. United States Postal Service, MSPB Case No. DC035100006 (decided June 11, 1980) (MSPB I). That was appealed, with this court affirming. Van Sant v. United States Postal Service, Civil Action No. 81-769 (E.D.Va., decided February 11, 1982 (Van Sant III). The Court of Appeals again reversed and remanded for a

more complete evidentiary hearing. Van Sant v. United States Postal Service, Appeal No. 82-1305 (4th Cir., decided March 24, 1983) (Van Sant IV). Pursuant to this remand the MSPB conducted a two-day hearing on November 28 and 29, 1983. The plaintiff, now represented by counsel, appeared and testified, and his counsel cross-examined witnesses of the USPS. The plaintiff now seeks review of the MSPB's decision following that hearing, which once again upheld plaintiff's termination. Van Sant v. United States Postal Service, MSPB Case No. DC0351802006REM (decided January 10, 1984) (MSPB II).

The court has read the transcript of the two-day hearing as well as referred to the exhibits and portions of the previous hearings where so directed by counsel and where necessary to resolve the issues presented.

Transfer of Function

Prior to his termination, plaintiff was a "planning architect" in the Plant Engineering Branch of the Research and Development Department of the United States Post Office (POD). The "planning architect" is to be distinguished from the "design architect." The latter refers to professional architects with responsibility for detailed architectural and aesthetic design in the Department of Facilities in the POD. The former, of which plaintiff was one, and as their task the development of "functional design specifications" (FDS). The plaintiff, who is not a professional architect, insists that no official distinction is made between a planning and a design architect; but neither does he dispute that the planning architect's job did not require the skill or training of a professional architect. The MSPB found, and the record supports this finding, that FDS tasks were a separate function not transferred to the

Corps of Engineers (COE) when, on June 29, 1971, the POD transferred to the COE the responsibility for the tasks performed by the "design architects." Apparently the plaintiff did not argue to the contrary before the MSPB (see MSPB II at 4-5), although he does in this appeal.

The POD group to which the plaintiff did belong was the Plant Engineering Branch for Research and Development. As a "planning architect," the plaintiff's tasks included preparing drawings that would outline site dimensions, parking facilities, size of buildings, look-out arrangements, and computation of square footage per personnel, some of which were prepared even before a particular postal facility site was selected. Certain FDS work, such as systems layout, was apparently reserved for Industrial Engineering Technicians (IET's) even before the plaintiff's loss of position. In contrast, the design architects

who were transferred to the COE belonged to another branch, the Bureau of Facilities. They were the professional architects concerned with the actual building design and construction, tasks not within the plaintiff's responsibility or expertise.

The June 27th transfer was part of a plan for COE to take over construction responsibilities formerly held by the POD. Thereafter, the POD (which became the USPS several days later on July 1, 1971) had as its primary concern moving the mail. To this end it had a diminished interest in and responsibility for buildings and structures.

Following the July 1, 1971 reorganization of POD into the USPS, the Research and Engineering Department was abolished, and the planning architects were trnasferred to the Mail Processing Branch of USPS. Consistent with USPS's diminished responsibility for building design and constructin, there were no architectural, design or

planning, tasks for the plaintiff to perform. Were this all, the termination of the plaintiff and the other planning architects on grounds that "no other work [was] available" would be unassailable on the merits, since it is clear that no other permanent, full-time position was estabished in any competitive area for which the plaintiff qualified.2/

Detailing of COE Architects to USPS

The Plaintiff's principal argument is that, on June 28, 1971, COE "detailed" eight employees, four of whom were architects,3/ to the USPS Mail Processing Group to do FDS work, which in reality had been plaintiff's work. These four architects were former POD employees that were among the 136 employees previously sent to COE with the transfer of

2/ The plaintiff contests this, as will be discussed infra, pp. 7-11.

3/ The other four were engineers, and their status, according to the plaintiff, is not relevant to the issues before the court.

the POD Department of Facilities design and construction function. Since the four "detailees" were still performing FDS work for the USPS at the time of the plaintiff's August 27, 1971 termination notice, the plaintiff asserts that the FDS function had in fact been transferred to COE. As a consequence, of course, he would retain his Veterans preference and could not have been "RIF'd," as pointed out in previous opinions in the case.

It is not necessary for the court to adopt the plaintiff's position as far as actual transfer of function to the COE is concerned. It finds that, under the reality test set forth by the Court of Appeals in its March 14, 1984 remand decision, the plaintiff can, at least to some extent, prevail.

The first question of what work was being done by those "detailees" is a question of fact. The decision of the MSPB

on this aspect of the case is, in part:

> These employees [detailees] performed work being done in the Mail Processing Group, including functional design specification work. The 1980 decision in this case set out in detail that at the time of this detail, the appellant's responsibilities were to develop functional design specifications (FDS) for postal facilities. See pages 2 and 3. Of concern in this appeal is the fact that appellant was RIF'ed because there was no other work available while COE employees were doing FDS work on detail.

MSPB II at 4.

> There is, however, essentially no dispute about what the nature of the assignments given the COE architects [detailees] was. In 1980, the appellant and the USPS stipulated that if those COE employees who had been detailed were to testify they would verify that they were detailed and that while on detail worked on FDS packages. At the most recent hearing two of these former detailees did so testify. See testimony of Blanchard and Carnahan. In addition, records were reviewed with regard to the other architect detailees, Messrs. Miller, Milaknis and Dickerson. This testimony was concurred in by their former COE supervisor, Mr. Barnes, and by the USPS official, Mr. Weirnicki. Also, Mr. Weirnicki's August 1, 1971 request for an extension of the details reflects the COE employees would be doing FDS packages. Appellant's Motion for Summary Judgment.

MSPB II at 7.

The decision then, in conclusory terms, points out that:

> The detail of some employees to an office whether in their employing agency or another, does not constitute a transfer of function as there is no transfer of the function from one competitive area to another.

MSPB II at 7.

This begs the second question of what constitutes a transfer. The issue is not whether there is some formal transfer of function, but whether the detailing of these four architects to do work which the plaintiff could and had been doing was in reality a transfer of those architects (see Van Sant IV at 8). If so there was "other work available." The court does find a transfer in reality because the same FDS work - Van Sant's work - was still being done; it was simply being done by COE personnel.

The MSPB further states that detailees of COE could not be RIF'd by USPS because they did not work for USPS, and consequently were not similarly situated for purposes of

determining whether employees lacking the plaintiff's preference must be RIF'd before the plaintiff. This again ignores the reality of the situation, lifting form over substance.

Finally, the Court of Appeals directed on remand that inquiry be made into the length of time the "detailees" worked for the USPS. The MSPB found that the last of them completed his "detail" on December 7, 1971. The record supports this, as well as the finding that thereafter "no other work [was] available" because neither the plaintiff's position nor his former task was continued and because the detailees were no longer in the plaintiff's competitive area.

In summary, it is only from the December 7, 1971 date that the plaintiff's termination can be valid. He is therefore entitled to the pay he would have received from October 12, 1971, the day he was released, until the time he would have been

released had a notice of termination been given him on December 7, 1971.

IET

The plaintiff alternatively argues that the FDS work, if retained by USPS, did not just disappear, but had to be done by someone.4/ It is true that after October, 1971, the FDS duties were absorbed by the Engineering Systems Design Branch of the Mail Processing Group of USPS; however, the specific disciplines in that branch were engineering and performed by IET's. Since the FDS duties were basically planning rather than architectural duties, the plaintiff claims that he should have been considered for one of these IET positions.

The defendants reply that the issue of plaintiff's being considered for an IET position is not before the court; that it is

4/ The MSPB, in its January 10, 1984 decision concluded that the 1980 decision that plaintiff's work had been contracted out was in error, and that this work had not been contracted out.

not within the terms of the remand from the Fourth Circuit; and that the plaintiff did not raise the issue before the MSPB in the latest hearing until his post hearing brief.

In deciding whether this issue can now be heard, the court notes the plaintiff first raised it before the Civil Service Commission (CSC) in 1972. In rejecting the plaintiff's position, the CSC Appeals Examining Office, on March 11, 1972, stated the following:

> With regard to the PS-895-14 Industrial Engineering Technician positions occupied by Messrs. John J. and Louis W. Huff, we find that your education, training, and experience show your qualifications to be preponderantly in the area of Architecture. It appears that your main emphasis has been planning and designing structures whereas the Industrial Engineering Technician position as utilized by the U.S. Postal Service require the design and evaluation of mail-flow systems within postal structures.

MSPB I, Ad. Rec. Part I at 156.

While not specifically addressed in the complaints filed in this court, the issue was again raised in 1980 when the Appeals

Officer explored the question of what work the Mail Processing Department was doing after it absorbed the duties of the Research and Engineering Department. At that hearing the following colloquy occurred between the Appeals Officer and the witness Clements, a structural engineer with the USPS in 1971:

Q. The Research and Engineering Department was abolished approximately the same time, or some time in the fall of 1971, is that correct?

A. I guess it did, yes. It was abolished July 28, 1971 and became Mail Processing.

Q. It became Mail Processing. There had not been a Mail Processing prior to that, is that correct.

A. I'm not sure about that. We went through so many organizational changes.

Q. But it is true that the Mail Processing Department took over the functions of the Research and Engineering Department?

A. This is correct.

Q. Okay. And the duties that Mr. Van Sant performed in Research and Engineering were, then, performed by the Mail Processing Division?

A. Right.

Q. And who performed those duties in the Mail Processing Division?

A. Well, Mr. Van Sant and people that had been in Research and Enginnering.

Q. After the architects separated by reduction of force, who performed those duties?

A. Practically all of it, if not all of it, went to an outside consultant.

Q. And the planning?

A. The planning work, like Mr. Van Sant was doing.5/

MSPB I, Ad. Rec. Part III at 76-77.

At the most recent MSPB hearing the Appeals Officer stated at the outset that "... the pleadings, the materials which have been previously submitted in previous considerations of this matter are already in eivdnece and will be considered...." MSPB II, Ad. Rec. Part IV at 12. Moreover, the plaintiff's counsel made it clear that the IET argument was part of the plaintiff's case. MSPB II, Ad. Rec. Part IV at 89-90.

5/ As previously indicated, this was proved to be incorrect.

Certainly the remand of the Court of Appeals did not foreclose consideration of the issue. While specifying certain issues to be addressed on remand, it directed the MSPB to make findings of fact on those "and any other relevant issue." Van Sant IV at 10.

Finally the MSPB did address the issue in the following language:

> I find that the preponderance of the testimony, including the appellant's, and the documentary evidence indicates that following the RIF, no one took over the "position" which the appellant had occupied. Rather the duties (sic) responsibilities which had been assigned to the appellant were absorbed into other positions in the new Engineering Systems Design Branch. Some duties were included in the project manager's position. Most of the drawing and drafting duties were assigned to various engineering technicians. Agencies generally have the authority to organize as they deem appropriate.

MSPB II at 11.

Consequently the court finds that the IET issue is properly before it.

The plaintiff's argument, however, was initially rejected on March 11, 1971 by the

CSC Appeal Examining Office in the language quoted above, and the records bear out the Commission's judgment. The "architectural" duties of the FDS did not "have to be done by someone" in the sense that one individual take over plaintiff's work. Instead the FDS duties could be split among several individuals and that apparently is what has happened here. After the reorganization, the planning duties of the plaintiff were taken over by the IET's, variously referred to as Huff, Ruff and Simmons, who were qualified to perform systems engineering, which they continued to do, and who apparently were also qualified to do the planning work. The plaintiff was qualified only to do the planning work, yet now seeks to have one of the IET's, while doing work the plaintiff cannot do, "bumped" in his favor.

There is no obligation, however, on the part of the USPS to accommodate the plaintiff by separating the planning from the

systems work so he will have a full time job. The USPS could use its business judgment to organize itself so that the IET's jointly shared in the FDS Work. There was just no place for an "architect" with the plaintiff's credentials in the reorganized Postal Service, and the Service was not required to create one.

Procedural Arguments

Much of the plantiff's argument as to the procedural deficiencies of his termination has to do with the formal validity of the "detailing" and the failure to include the detailees within the plantiff's competitive area. These have been resolved in prior parts of this opinion. Plaintiff has shown no deficiency in procedures used to carry out the RIF.

Conclusion

For the foregoing reasons the decision of the MSPB will be affirmed except to the extent that it found the plaintiff's notice

of termination to be proper as of August 27, 1971. The proper date for notice of termination is determined to be December 7, 1971.

/s/ A.V.B.,J.
United States District Judge

Alexandria, Virginia
October 24, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VICTOR HOWARD VAN SANT, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-417-A
UNITED STATES POSTAL SERVICE, UNITED STATES CORPS OF ENGINEERS, and MERIT SYSTEMS PROTECTION BOARD, Defendants.	)	

O R D E R

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the January 10, 1984 decision of the Merit Systems Protection Board is reversed only insofar as it determined that the proper date of the plaintiff's notice of termination was August 27, 1971, the court now determining that the proper date for the notice of termination is December 7, 1971. In all other respects the said decision is affirmed. And it is further

ORDERED that the plaintiff be paid additional salary and benefits which he would have been paid had the notice of termination been given on December 7, 1971 instead of August 27, 1971.

/s/ A.V.B.,J.
United States District Judge

Alexandria, Virginia
October 24, 1984

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1305

Victor Howard Van Sant,

Appellant,

v.

United States Postal Service, Corps of Engineers, Merit Systems Protection Board, The United States,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued: December 8, 1982
Decided: March 24, 1983

Before SPROUSE and ERVIN, Circuit Judges, and MICHAEL*, District Judge.

---

*Honorable James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

PER CURIAM:

Over eleven years ago Victor Howard Van Sant's job with the United States Postal Service was terminated. Fighting this discharge, Van Sant Pursued his administrative remedies unsuccessfully, and then filed an action in district court, which upheld the Civil Service Commission. This court, in an unpublished opinion handed down on September 7, 1979, reversed and remanded for "a complete evidentiary hearing" on Van Sant's claim. The Merit Systems Protection Board ("MSPB," the successor to the Commission) subsequently held a hearing. That hearing, however, was anything but complete. On the basis of the hearing, the MSPB upheld Van Sant's discharge. Van Sant appealed directly to this court, which held that direct review of MSPB decisions by the courts of appeals is not available in proceedings begun before

1979, the date of the Civil Service Reform Act. Van Sant thereupon filed an action in district court, which upheld the MSPB's decision. We now vacate that court's judgment and remand once again for further evidentiary proceedings.

I.

In early 1971, Van Sant was a "planning architect" in the Plant Engineering Branch of the Research and Development Department of the United States Post Office. The primary task of the four planning architects in the department was to develop "functional design specifications." Responsibility for detailed architectural and aesthetic design was exercised by "design architects" in the Post Office's Department of Facilities. As part of the Post Office's reorganization as the United States Postal Service (the "Service") under the 1970 Postal Reorganization Act, the Postmaster Gen-

eral entered into an agreement with the Army Corps of Engineers (the "Corps") in March 1971. On its face the agreement transferred to the Corps, among other tasks, the responsibility for the job previously performed by the Facilities Department's design architects. Pursuant to statutory provisions protecting the employment of civil servants whose jobs are transferred from one agency to another, the Post Office on June 27, 1971, transferred 136 persons, including the Facilities Department design architects, to the Corps.

On June 30, 1971, the Post Office was abolished and its employees, including Van Sant, became employees of the Service. Between June 28 and July 2, several of the design architects who had been transferred to the Corps were detailed to work in Van Sant's department. They apparently performed the same

planning duties Van Sant had been doing; indeed, Van Sant claims that they took over all his work, leaving him nothing to do. On July 28, the Research and Development Department was abolished and its planning architects transferred to the Mail Processing Department of the Service. A month later, Van Sant and his colleagues were informed that their positions were going to be abolished, and on October 5, 1/ Van Sant was separated from the Service. 2/

The Service apparently conceded at the MSPB hearing that the architects

1/ Or October 12; the MSPB findings are unclear. Van Sant stated at the MSPB hearing that his separation became final on October 12.

2/ One of Van Sant's fellow planning architects remained at the Service for almost six more weeks because, according to the Civil Service Commission's letter to Van Sant of March 14, 1972, it appeared, incorrectly as it turned out, that he would be placed in another agency.

detailed back to the Service by the Corps performed planning tasks for periods of time subsequent to Van Sant's separation from the Service in October. A 1972 Equal Employment Opportunity Commission affidavit by Van Sant's erstwhile superior John Wiernicki stated that as of January, 1972, the planning tasks were being performed by the Corps. 3/ The planning tasks eventually were contracted out to private architects.

Van Sant's interpretation of these events is that his planning duties continued to be performed by government employees--the former Post Office design architects who were transferred to the Corps and then detailed back to the Service--after his separation and that

3/ This affidavit directly contradicts the finding of the MSPB that the Corps architects were detailed to the Service for sixty to ninety days.

only at a later date did the Service contract out the planning function. The Service maintains that the design function was transferred to the Corps and the planning function retained; that the Service then decided to contract out the planning function and pursuant to that decision discharged Van Sant; and that the performance of planning duties by the Corps employees was only a temporary expedient.

II.

Van Sant's legal contention is that the government violated the 1944 Veterans' Preference Act, 5 U.S.C. § 3503 (a) (1977),4/ in discharging him. At the time this action was begun, section 3503(a) stated that

4/The subsequent rewording of § 3503, see Pub.L. 96-54, § 2(a)(18), 93 Stat. 382 (1979), is of no significance in this litigation.

> [w]hen a function is transferred from one agency to another, each preference eligible employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

It is uncontested that Van Sant, a World War II veteran, was a "preference eligible" within the meaning of this provision, and as such was entitled to the protection afforded therein had his function been transferred from the Service to the Corps.

The disagreement between Van Sant and the Corps is factual: was the Post Office planning function for which Van Sant was employed transferred by the Service to the Corps as Van Sant maintains, or was it first retained by the Service and then abolished, as the Service insists? Van Sant, in addition, contends that his separation from the

Service by a "reduction in force," 5 C.F.R. §§ 351.201 et seq., was procedurally invalid. 5/

The Service was entitled to discharge Van Sant by the reduction in force mechanism if it did so pursuant to contracting out his job to private architects. See American Fed. of Govt. Employees v. Stetson, 640 F.2d 642 (5th Cir. 1981). The Service points to the established fact that all four planning architects were discharged in or around October, 1971, as supporting the MSPB's

5/ Van Sant's claim on this point depends on acceptance of his view of the function transfer issue: (1) the only reason given him for his discharge was "no other work available," (2) accepting his view that the Service transferred rather than abolished his job this was untrue; (3) therefore he was entitled to be transferred to the Corps, the Service having failed to cite a reason for his discharge. This is a neat syllogism but stands or falls on the correctness of its middle term, and is in fact a restatement in other words of his substantive claim.

conclusion that Van Sant's position genuinely was abolished. Van Sant points to the continued performance of planning duties by the Corps design architects after his discharge as proof that, in reality if not in name, the planning function was transferred to the Corps. He also points to various documents that, he contends, confirm that the planning duties were assumed by the Corps for a significant period of time. Although the MSPB accepted Van Sant's contention that the design architects transferred to the Corps performed planning duties while detailed back to the Service, it found as a fact that this was the temporary performance of duties other than those transferred to the Corps.

"The question of whether there has been an actual transfer of functions . . . is a question of fact." Nat'l Council of CSA Locals, AFGE v. Schweiker,

526 F.Supp. 861, 866 (D. D.C. 1981). This determination "cannot be based on a simple reading of the statute," and requires the MSPB to make a "careful review" of "the individual functions performed at [the old agency] and to be performed at [the new agency]." Id. at 864. Our opinion remanding this case to the MSPB for an evidentiary hearing directed the agency to determine the substantive nature of the jobs involved, not their labels: the MSPB was instructed to "focus upon the nature of Van Sant's job function with Research and Engineering in order to determine which department, if any, now performs that function."6/

6/ We note that federal regulations also view transfers of functions in pragmatic rather than formalistic terms. The regulations define a "function" as "all or a clearly identifiable segment of an agency's mission, regardless of how it is

In our view, the MSPB's review of Van Sant's complaint failed to undertake the "careful review" of job functions required to effectuate the Veterans' Preference Act and mandated by this court. The MSPB concluded that the planning function in which Van Sant was employed was abolished, not transferred. In reaching this conclusion, the MSPB compared Van Sant's job description with the description of the functions transferred to the Corps contained in the March 1971 interagency agreement. Noting that the latter document described the design but not the planning function, the MSPB "determined" that the latter was not transferred. This conclusion does not

---

performed," 5 C.F.R. § 351.203(c), and state that a transfer of function occurs "regardless of whether or not the movement [of the function] is made under authority of a statute, Executive Order, reorganization plan, or other authority." 5 C.F.R. § 351.301.

follow. Van Sant's argument is that some of the design architects transferred under the agreement to the Corps were put to work doing his planning tasks and that therefore in reality the latter also were transferred. The mere fact that the agreement does not mention this second function transfer does not prove that it did not happen.

The MSPB dismissed the presence of Corps employees doing planning tasks at the Service as irrelevant because they were on a temporary detail, for sixty to ninety days, involving duties other than those performed as a function of the Corps. To do so, the MSPB had to erect the halting replies of one government witness into certainties. The witness, as an examination of the hearing transcript reveals, was quite uncertain about the purpose of the Corps' employees' presence, or the length of their stay.

The MSPB opinion asserts that Van Sant's discharge was pursuant to a prior decision to contract out his tasks, followed by implementation of that decision. However, the record before this court does not support that chronology. After reading the record, we remain uncertain when the Service decided to abolish the planning function jobs, when it in fact contracted out those jobs, or why it, as it admitted at the hearing, utilized Corps employees in those jobs for some unknown period after Van Sant's discharge instead of retaining Van Sant, a "preference eligible" under the Veterans' Preference Act.

Finally, the MSPB totally failed to determine which department, if any, was performing the planning function at any

relevant point of time, despite this court's specific instructions to do so.7/

We are loath to remand this case for yet another round of proceedings, but we perceive no other alternative. On the basis of the inadequacies in the record, and the discrepancies between the record and the MSPB's findings, we are compelled to conclude that the MSPB's decision was not supported by substantial evidence, 8/

7/ Van Sant raises a procedural issue concerning the conduct of the evidentiary hearing. Despite a request by the hearing officer, the Service and the Corps refused to produce witnesses for whom Van Sant had asked. In order to cure the unfairness created by this recalcitrance, the hearing officer stated that he would accept as true the contentions Van Sant hoped to establish by the witnesses. Van Sant complains that the MSPB did not do this liberally and fairly. A comparison of Van Sant's offer of proof with the MSPB's written opinion tends to confirm Van Sant's complaint.

8/ In cases coming before us from the MSPB, "[o]ur review is limited to determining whether the Board's proceedings, findings, and conclusions (1) were arbitrary, capricious or otherwise unlawful;

and therefore cannot stand. See Federal Power Commission v. Transcontinential Gas Pipe Line Corp., 423 U.S. 326 (1976) (court of appeals ordinarily must remand agency decision not sustainable on administrative record).

The problems we perceive in the present administrative record are not altogether the fault of the MSPB. 9/ Nevertheless, we stress that on remand it is the obligation of the MSPB to develop fully a record directly addressing the issues in dispute between Van Sant and the Service. These issues include, but

---

and (2) adhered to required procedures; and (3) were supported by substantial evidence." Snipes v. U.S. Postal Service, 677 F.2d 375, 376 (4th Cir. 1982) (per curiam). See 5 U.S.C. § 7703(c) (1980).

9/ The uncooperative attitude of the Service and the Corps, and the sometimes inept character of Van Sant's pro se representation before the hearing officer no doubt contributed significantly to the confusion.

are not limited to, the actual nature of the work performed by the Corps architects detailed to the Service, the reasons for assigning that work to those persons rather than to Van Sant, the time period during which the Corps employees worked at the Service, the date of the Service decision to abolish the planning function, and the date of its actual abolition. On these, and any other relevant issues, the MSPB is to make the findings of fact necessary for a final resolution of this unduly prolonged litigation.

III.

We reverse the judgment of the district court upholding the MSPB's decision, and remand to the MSPB for further proceedings.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1583

Victor Howard Van Sant,

Appellant,

versus

The United States; Postmaster General, U.S. Postal Service; Chief of Engineers; Corps of Engineers, Commissioner, Civil Service Commission.

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge

---

Submitted June 21, 1979
Decided September 7, 1979

Before HAYNSWORTH, Chief Judge, WINTER and BUTZNER, Circuit Judges

---

PER CURIAM:

Victor Van Sant was discharged from his job as an architect with the Post Office Department when that agency was

reorganized into the United States Postal Service. The reorganization was begun in 1970 pursuant to the Postal Reorganization Act and Van Sant's position was terminated in 1971. He contends that his job function was transferred from the newly formed Postal Service to the Corps of Engineers and that he was statutorily entitled to have the option of accepting employment with the Corps of Engineers prior to being discharged completely from government service. He seeks back pay and reinstatement.[1]

---

1. The government argues that although Van Sant filed this suit within the applicable statute of limitations, see 28 U.S.C. § 2401(a) (six years), his cause should be barred by the equitable doctrine of laches. The government notes that Van Sant waited five years from the date his right of action accrued before he filed suit in district court. "Laches is sustainable only on proof of both of two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." Mogavero v.

The legal basis for Van Sant's contention is 5 U.S.C. § 3503 which provides:

> When a function is transferred from one agency to another, each preference eligible employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

The Postal Service does not deny that Van Sant was "preference eligible" at the time of his discharge; however, it does deny that Van Sant's job function was transferred to the Corps of Engineers. The Service contends that Van Sant's discharge was necessitated solely by a

---

McLucas, 543 F.2d 1081 (4th Cir. 1976). It is questionable whether the government has satisfied either of these two requirements. In any event, not one scintilla of evidence has been introduced to show prejudice. The government's contention is, therefore, without merit and the doctrine of laches will not be applied.

reduction in the work load requirements of Van Sant's department--the Mail Processing Group. Van Sant had been assigned to the Mail Processing Group after his original department, Research and Engineering, had been abolished during the reorganization. Mail Processing Group was a spin off of the latter department. The Service further avers that no functions of the Mail Processing Group were transferred to the Corps of Engineers.[2] The government does acknowledge that 130 employees of the Postal Service were given the opportunity to transfer to the Corps of Engineers;

2. A very confusing aspect of this case revolves around Van Sant's assignment to the Mail Processing Group. On the one hand, we are told that Van Sant's job function, i.e., architectural, fit within the functions assigned to the Mail Processing Group. On the other hand, the

however, those employees were working in the Service's Department of Facilities, the functions of which had in fact been absorbed by the Corps of Engineers.

Plaintiff disputes the contention that his job function was not transferred to the Corps of Engineers. He alleges that several months prior to his final discharge five employees from the Corps of Engineers substantially took over all of the work that had previously been assigned to him. The Service does not deny this contention, but attempts to explain the takeover in that the five employees from the Corps of Engineers "were completing functional design work

---

Service justifies Van Sant's discharge from the Mail Processing Group in that the Group did not require the services of any architects. Moreover, it remains unanswered as to whether anyone in government service has continued to perform those same functions which had been assigned to Van Sant.

on projects which were to be taken over by the Corps." Oddly, this justification seems to imply that Van Sant's job function as an architect had indeed been transferred to the Corps of Engineers.

The plaintiff has fully exhausted the Civil Service Commission appeals process and the Commission has upheld Van Sant's discharge. Specifically, the Commission found that Van Sant's job function with the Postal Service was not transferred to the Corps of Engineers. The sole basis for this conclusion is the quoted cryptic explanation proffered by the Postal Service and the Service's general contention that no functions of the Mail Processing Group were transferred to the Corps of Engineers.

In 1978, five years after the issuance of the Commission's ruling, Van Sant lodged a complaint in district court seeking reversal of the Commission's

findings. The district court upheld the ruling of the Commission, stating, "There being no basis in the record for disturbing the Commission's findings its decision must be affirmed." Van Sant v. United States of America, C/A No. 77-756 (E.D.V. April 27, 1978). Summary judgment was granted in favor of the government.

The findings of the Commission or of any agency appeals process will be affirmed unless it be shown that those findings are "arbitrary, unreasonable, capricious, or not supported by substantial evidence." Halsey v. Nitze, 390 F.2d 142, 144 (4th Cir.), cert. denied, 392 U.S. 939 (1968); see also Phillips v. Bergland, 586 F.2d 1007, 1012 (4th Cir. 1978). A thorough review of the certified record of this case submitted by the United States Civil Service Commission reveals very little

evidence at all. The bulk of the record consists of correspondence of no evidentiary value and the written findings of the Commission are generally conclusory. Particularly disturbing is the Commission's failure to fully and fairly investigate the transfer of function issue. Apparently the Postal Service's mere denial of plaintiff's allegation was deemed an appropriate basis for the Commission's adverse ruling. This is error. Something more than bald reliance upon the assertions of the Postal Service is required.

In short, nothing in the record supplied by the Civil Service Commission lends any credence to the ultimate conclusion reached by that body. Since nothing in the record would justify a conclusion that the Commission had based its finding upon substantial evidence, we remand this case to the district court

with instructions to further remand to the Civil Service Commission for a complete evidentiary hearing on the issue of whether Van Sant's job function was transferred to the Corps of engineers or to any other department, and whether, if so, Van Sant was entitled to a transfer to the receiving agency. Such a hearing should focus upon the nature of Van Sant's job function with Research and Engineering in order to determine which department, if any, now performs that function.

Accompanying this appeal are a number of collateral motions submitted by plaintiff. In light of the disposition of this appeal, we find it unnecessary to address the merits of those motions and, accordingly, those motions are denied.

REVERSED AND REMANDED

Equal Access to Justice Act as
amended and renewed in 1985
(applicable portion)

28 U.S.C. Section 2412. Costs and fees

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. . . .

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title

and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statutue, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the

rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection --

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the

court determines that an increase in the cost of living or a special factor, such as the limited availablity of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; ...

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

. . .

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

. . .

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for

judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

. . .

5 U.S.C. Sec. 3503. Transfer of functions [as in force in 1971]

(a) When a function is transferred from one agency to another, each preference eligible employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

(b) When one agency is replaced by another, each preference eligible employed in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 429.

5 C.F.R. Part 351 - REDUCTION IN FORCE
[Regulations of the Civil Service Commission, effective in 1971]

Subpart H - Notice to Employee

Sec. 351.801. Notice period.

(a) Each competing employee selected for release from his competitive level under this part is entitled to a written notice at least 30 full days, but not more than 90 full days, before the effective date of this release, except as required to comply with this part.

* * *

Sec. 351.802. Content of notice.

Except as provided in sec. 351.803, the notice required by sec. 351.801 shall state specifically the action to be taken and its effective date; the employee's competitive area, competitive level, subgroup, and service date; the place where the employee may inspect the regulations and records pertinent to his case ... the reasons for retaining a lower-standing employee in the same competitive level for more than 30 days under sec. 351.608; and the employee's appeal rights, including the time limit for appeal and the location of the Commission office to which an appeal should be sent.

Application for Attorney Fees
and Other Expenses

TABLE OF CONTENTS

Page

Summary of Application
I. Remarks Applicable to sec. 2412(b) or (d)(1)(A).....1
Extension of EAJA, amended increase awards.....3
Why this application is timely under amended provisions.....4
Van Sant qualifies financially and as a "prevailing party"...4
Why the application has been filed in this court.....7
The nature of this application in relation to other, still pending, issues.....8
This application is governed by the EAJA and not by any other statute.....10
Why pre-October 1, 1981, fees and expenses are included....10
Why Van Sant's pro se expenses from 1977 to 1980 are claimed, including lost income.....11
Why 1st and 2nd Remand MSPB proceedings are included.....14
Why time and expense in applying for fees and expenses are included.....16

II. Why an Award Should Be Made Under Section 2412(b) ("Bad Faith").....17
A. Postal Service pre-litigation bad-faith.....17
B. Obdurate litigation conduct...17
C. Relation of fees to benefits is not relevant for sec. 2412(b) awards.....29

III. Why Fees and Expenses are Necessarily Due, in the Alternative, Under Section 2412(d)(1)(A).....30
The 1985 Act clarified 'position of the United States" to embrace both litigation conduct and pre-litigation conduct.....30
The "position of the United States" clearly was not substantially justified".....31
A cost of living adjustment of 22.7% in the D.C. area should be made.....33
Attorney's fees should not be diminished because Van Sant has not yet received major monetary benefits.....34

IV. Summary of Fees and Expenses Requested.....37